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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1363

UNITED STATES OF AMERICA

v.

DOMINIC ALESSIO, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

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No. .....

UNITED STATES OF AMERICA
v.
DOMINIC ALESSIO, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Dominic Alessio petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reproduced in Appendix A. The trial court, the United States District Court for the Central District of California, rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered on January 14, 1976. A petition for rehearing was denied on February 24, 1976 (Appendix C). By order of March 1, 1976, the Court of Appeals stayed its mandate until March 25, 1976 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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QUESTIONS PRESENTED

1. Whether giving a gratuity to a public official who has the authority to affect the donor's interests for good or ill, without intent to compensate the official for any specific act, is a felony under 18 U.S.C. § 201(f), rather than no crime at all, or, at most, a misdemeanor under 18 U.S.C. § 209.

2. (a) Whether a criminal defendant requiring the testimony of a witness who will testify only if granted use immunity is entitled, under the due process clause of the Fifth Amendment and the compulsory process clause of the Sixth Amendment, to have such immunity granted to the witness, especially when the Government has already unilaterally decided not to prosecute the witness.

(b) Whether, in such a case, when the prosecution refuses defendant's request to invoke 18 U.S.C. §§ 6001 et seq., although it has invoked the statute to immunize a prosecution witness in the case, the court should vindicate defendant's constitutional rights by dismissing the indictment or by such lesser steps as explaining to the jury the reason for the absence of the testimony, or, at least, preventing the prosecution from commenting to the jury on the absence of the testimony.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 201.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any pub-

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lic official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty,

* * * * *

Shall be fined not more than $20,000.00 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 201(f).

Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any

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official act performed or to be performed by such public official, former public official, or person selected to be a public official;

* * * * *

Shall be fined not more than $10,000.00 or imprisoned for not more than two years, or both.

18 U.S.C. § 209(a).

Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be fined not more than $5,000.00 or imprisoned not more than one year, or both.

18 U.S.C. § 6002.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or pro-

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vide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States . . .

* * * * *

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6003.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against

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self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony of other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

STATEMENT

Petitioner and his family were in the hotel and race track business in San Diego, California, and Tijuana, Mexico. (RT 1141-43.)[1] Petitioner's father and uncle were inmates at the Lompoc Prison Camp, serving tax evasion sentences. (RT 1090.) Another inmate at the camp was Maurice Friedman, a man with hotel and gaming interests in Las Vegas, Nevada. The Camp Administrator, Anthony Santiago, having planned a family vacation trip to Las Vegas and San Diego, discussed his plans with Friedman, who undertook to arrange the trip and make all necessary reservations. Friedman carried out those undertakings as to the Las Vegas portion

[1] "RT" citations are to the transcript of the trial. "CT" citations are to that part of the record below containing documentary evidence, pleadings, docket, etc.

of the trip, and Friedman arranged with Petitioner for the San Diego portion. The result of these arrangements was that Santiago and his family (his wife, two children, and two sisters-in-law) enjoyed the facilities of a number of hotels and restaurants and, when time came to pay, he was told the services had been complimentary. The total complimentary services for the San Diego portion of the trip, arranged by Petitioner, came to about $450.00. (RT 556-83.)

For providing those complimentary San Diego services to Santiago, Petitioner was indicted in two counts. Count 1 charged bribery under 18 U.S.C. § 201(b); Count 2 charged an illegal gratuity under 18 U.S.C. § 201(f), in that the complimentary services had been given "for and because of official acts performed by and to be performed by Anthony Santiago relating to the confinement of John Alessio and Angelo Alessio."[2] Santiago was indicted in Count 3 under 18 U.S.C. § 201(g) for receiving an illegal gratuity. He pleaded guilty to that offense and testified for the prosecution at the trial. (CT 362.) Petitioner was acquitted of the bribery count, but convicted of the gratuity count.[3]

A substantial part of Petitioner's defense was that he

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[2] By formal concessions and stipulations at the trial, the case was confined to acts "to be performed" and, moreover, only to those relating to the confinement of John Alessio, Petitioner's father. (RT 548.)

[3] He was sentenced to two years imprisonment, all but the first six months suspended; the court also imposed three years probation and a $10,000.00 fine. (RT 1634.)

arranged the "comping" of the San Diego portion of Santiago's vacation trip not "for and because of" any act to be performed by Santiago for Petitioner's father, but solely at Friedman's request, as part of the custom of the trade that both Friedman and the Alessios were in.

No evidence was introduced that at the time the gratuities were given Petitioner had in mind any specific act to be performed by Santiago. Indeed, the prosecution's theory was that no such intent was necessary. Petitioner's intent, according to the prosecution, was to give the gratuities to Santiago "as a kind of a tip, because 'you're going to be dealing with my father,' and that's what this case boils down to." (RT 1529.) Petitioner, challenging the prosecution's theory, requested an instruction that the jury, in order to convict, "must find that the defendant had in mind one or more particular official acts at the time he gave something of value to Anthony Santiago." (CT 494.) The trial court refused to give that instruction, and, instead, instructed the jury:

> "In order to convict the defendant under the second count of the indictment, the Government must prove that the purpose which the defendant had in mind in making a gift to a public official was to give additional compensation or a reward, gratuity, or similar favor by reason of *some* 'official act, performed or to be performed by such public official.'" (RT 1586, emphasis added.)

In sustaining the conviction under Count 2, the Court of Appeals declared that:

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"Clearly, the intent necessary to establish a violation of this section may be present whether or not there was an agreement between appellant and Santiago regarding particular acts Santiago had performed or would perform"[4] Appendix A, p. 7a.

Sharing the prosecution's view, the Court of Appeals held that Petitioner's knowledge merely that Santiago had authority to affect the conditions of his father's confinement was enough to make the gratuities violate § 201(f). Appendix A, p. 8a.

Both at oral argument and in the petition for rehearing, Petitioner cited to the Court of Appeals (but that court totally ignored) the opinion that had just come down in *United States* v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974), after this Court's remand in *United States* v. *Brewster*, 408 U.S. 501 (1972). The Court of Appeals for the District of Columbia Circuit made it unmistakably clear in that case, that the gratuities condemned by § 201(f) are only those given with specific knowledge of a definite official act for or because of which the defendant intends to compensate the official. 506 F.2d at 77, 78, 80, 81, 82.

To corroborate his testimony that (1) it was Friedman, not he, who had made with Santiago whatever arrangement was made; (2) that in providing the free facilities for the San Diego portion of the trip, he had acted merely at Friedman's request; and (3) that his only intent had been to accommodate Friedman in ac-

[4] Petitioner concedes that an "agreement" is not necessary; however, submits that "particular acts" must be contemplated.

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cordance with the custom of the trade, Petitioner sought to adduce the testimony of Friedman. Friedman, however, was willing to provide the evidence sought only if granted immunity. Petitioner asked the Government to invoke 18 U.S.C. §§ 6001 et seq. to confer such immunity upon Friedman, but the Government, notwithstanding that (1) it had invoked the statute to immunize another witness whom it wished to use (RT 752-5),[5] and (2) it had already secretly conferred *de facto* immunity upon Friedman,[6] refused Petitioner's request. The trial court shrugged off Petitioner's complaint on the ground that it had no authority to control the Government's decisions. (RT 252.) Petitioner argued on appeal that the Government, by refusing to immunize Friedman, deprived Petitioner of his due process right under the Fifth Amendment and of his right to compulsory process under the Sixth Amendment. The Court of Appeals rejected Petitioner's argument by declaring, without explanation of any kind: "The testimony sought by appellant was cumulative of the testimony of other witnesses."[7] Appendix A, p. 6a.

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[5] The immunized witness, one Maria Della-Malva, testified to a matter the prosecution thought material to Count 1, of which Petitioner was acquitted.

[6] Friedman had been a Government witness in a number of other cases. See *United States* v. *Polizzi*, 500 F.2d 856 (9th Cir. 1974). In making its determination as to this case, the Department of Justice decided that Friedman would not be prosecuted for any of his activities with respect to Anthony Santiago. That decision, not revealed to Friedman, came to light during the trial. (RT 864.)

[7] Petitioner had requested immunization of two witnesses in

(This footnote continued on next page)

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The prosecution, having managed to prevent Friedman from corroborating Petitioner's testimony, then argued to the jury:

> "So what was Dominic's intent? Was it to help Friedman? Even if Friedman did contact him, what was Dominic's intent, to help Friedman. Dominic's intent at the time of the gifts was to help his father. There is no evidence that Friedman entered into it at all." (RT 1543.)

REASONS FOR GRANTING THE WRIT

1. The gratuity statute upon which Petitioner was convicted, 18 U.S.C. § 201(f), is part of a 1962 codification into Chapter 11 of Title 18, of various federal statutes on bribery, graft and conflicts of interest. In *United States* v. *Brewster*, 408 U.S. 501 (1972), this Court had occasion to treat with 18 U.S.C. § 201(c) and (g), the donee counterparts of the bribery and gratuity subsections here involved, § 201(b) and (f). The Court was concerned there, however, only with the statute's impingement upon the Speech or Debate Clause of the Constitution, Art. I, § 6. The broader implications of

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addition to Friedman. As to those two witnesses, there may be some basis for the Court of Appeals' conclusion that the proffered testimony would be cumulative. That conclusion can have no basis, however, in connection with Friedman's testimony. The only witness other than Friedman who had given testimony on the points for which Friedman's testimony was sought was the Petitioner himself. Petitioner's testimony, obviously, might be discounted by the jury. It is for that very reason that corroboration becomes so important. Corroboration is always cumulative in a literal sense, but to deny the accused the opportunity of adducing it is unthinkable.

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§§ 201 et seq. of Title 18 have therefore not had this Court's attention. With the nation's increasing post-Watergate preoccupation with the various aspects of governmental corruption, we submit that, unless this court turns its attention to these statutes, there will be a proliferation of contradictions, if not conflicts, among the lower courts.

Both this case and *Brewster* presented the problem of how to distinguish among bribery, § 201(b), gratuity, § 201(g), and a wholly lawful gift. The semantic intricacies of the jury instructions needed to distinguish the three situations amply justify the District of Columbia Circuit's advice to prosecutors not to go to trial on both bribery and gratuity charges. *United States* v. *Brewster*, 506 F.2d at 83. As that court said:

> "The danger inherent in the situation calling for the trial judge to distinguish sharply among guilt under the bribery section, guilt under the gratuity section, and innocence under either or both, is that the jury is subconsciously tempted to compromise. If the line between the greater and lesser offense is muddy . . ., then why should not the jury take the 'middle-ground,' *i.e.*, find the defendant guilty of the offense carrying the lesser penalty? This may have happened here."

That observation was made in *Brewster* notwithstanding that the gratuity instruction there, although confusable with the bribery instruction, was in itself a model of clarity as compared to the instruction here.

The *Brewster* gratuity instruction was:

"Therefore, in order to find a violation of 201(g)

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> you must find that defendant Brewster received the monies in question *knowing* that it was given and was *accepted for or because of an official act* he was going to undertake in the future *with respect to a particular legislative matter.*" 506 F.2d at 80. (Emphasis by the court.)

Here, by contrast, the court refused to instruct that the condemned gratuity must be for a specific act for or because of which it is intended. The instruction the trial court gave and the Ninth Circuit approved permits conviction under the gratuity section for a gift made to an official who *can* affect the donor's interest even if the donor has no specific act in mind.

However, whereas the *Brewster* court said a gratuity given the official with "insubstantial hopes for the future," rather than "in well-founded consideration for his forthcoming official action on specific proposed or pending postal rate legislation," would not violate the gratuity section, 506 F.2d at 77-78, the court here, by tying guilt to the donor's mere awareness of the official's *authority* to affect his interests, seems to hold "insubstantial hopes for the future" enough to make the gift a felony under the gratuity section.

Even if it could be said that the "hopes for the future" a donor might entertain after making a gift to a prison camp administrator are more substantial than those that could be entertained by a political contributor who has not identified the favor he seeks, it would seem that those hopes can hardly raise the gift to the level of the felony described in § 201(f). If such a gift, with no specific favor in mind, and with only such expectations

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as may be imputed to the donor from the putative gratitude of the donee, can be said to be a crime at all, it is no more than the misdemeanor described in 18 U.S.C. § 209, a private contribution to or supplementation of the salary of a government official "as compensation for his services as" such official.

The District of Columbia Circuit's clear requirement in *Brewster,* as the intent element of the gratuity offense, that the donor have in mind a specific act of the donee for or because of which the gift is given, finds support as well from the Second Circuit in *United States* v. *Irwin,* 354 F.2d 192, 197n.3 (2d Cir. 1965). The Ninth Circuit's decision here goes in the opposite direction. Unless this Court now intervenes, this increasingly important area of the law will become hopelessly confused.

2(a). The Sixth Amendment guarantees the defendant compulsory process to procure the testimony of witnesses in his defense. The Fifth Amendment, moreover, protects him against suppression by the prosecution of evidence he requires for his defense. *Brady* v. *Maryland,* 373 U.S. 83 (1963). Congress, by 18 U.S.C. §§ 6001 et seq., has given federal prosecutors a procedural tool with which to compel testimony which "may be necessary to the public interest" by granting recalcitrant witnesses use immunity. In the case at bar, the prosecution invoked the use immunity statute to compel the testimony of a witness for the prosecution; it refused, however, to invoke the statute at Petitioner's request to immunize a witness whose testimony was necessary to the defense and who was willing to testify only if

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granted use immunity. The particular witness, moreover, was one whom the Government had already decided not to prosecute in connection with the events to which he would testify.

Whether, in these circumstances, Petitioner's Fifth and Sixth Amendment rights have been infringed is a question of first impression in this Court.

In its brief below, at p. 60, the Government, citing *Earl* v. *United States,* 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967), stated its basic position on this question as follows:

> "The overriding consideration in immunity statutes has always been to limit the possibility of abuse of the power. Toward this end, Congress required the participation and approval of the Attorney General or his designee to assure political accountability for abuse. Congress did not wish to create a situation where criminals could avoid punishment by manipulating the process to immunize one another."

But the *Earl* case, as the Government fails to note, involved a demand for *transactional immunity* under 18 U.S.C. § 1406 (1964), not *use immunity* under 18 U.S.C. §§ 6001 et seq. A grant of transactional immunity, to be sure, does deprive the Government of the power thereafter to prosecute the witness. But a grant of use immunity deprives the Government of nothing. As this Court said in *Kastigar* v. *United States,* 406 U.S. 441, 461 (1972):

> "We conclude that the immunity provided by 18 U.S.C. § 6002 leaves the witness *and the prosecu-*

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torial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." (Emphasis added.)

Indeed, the upholding in *Kastigar* of the constitutional sufficiency of use immunity, has been looked upon as the Court's signal that the time may have to come to recognize the Fifth and Sixth Amendment rights of the accused to obtain immunity for the witnesses he needs. See Westen, *The Compulsory Process Clause,* 73 Mich. L.Rev. 71, 166-70 (1974). That issue, not before the Court in *Kastigar,* is presented in this case and, we submit, should now be decided.

Moreover, the Chief Justice, as author of the *Earl* opinion in the District of Columbia Circuit, suggested another reason why, under the circumstances of this case, the Petitioner's Fifth and Sixth Amendment rights should be protected. As he pointed out in *Earl,* 361 F.2d at 534n.1, even where full transactional immunity, rather than mere use immunity, is in issue, if the prosecution immunizes one of its own witnesses but refuses to seek immunity for a defense witness, the statute *as applied* may be said to have denied the defendant due process. The hypothetical situation thus posited is exactly what occurred in the instant case. Moreover, in the instant case, the Government had already decided not to prosecute the witness sought by Petitioner, so that its discriminatory invocation of the immunity statute can be looked upon in no other light than as a conscious, deliberate suppression of defense evidence.

2(b). If the Court concludes, as we submit it should,

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that the failure to grant use immunity to Friedman in the circumstances of this case violated Petitioner's Fifth and Sixth Amendment rights, what are the consequences?

In *Earl,* the Government argued that only Congress can fashion a procedure for immunizing a witness at the request of the accused and that Congress has not done so. The court, yielding to that argument held:

> "We conclude that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power." 361 F.2d at 534.

The court recognized, however, that the circumstances of a given case may require a holding that the Government has so misused the procedure which Congress created as to have denied the defendant due process. *Id.* at 534n.1. Without due process, of course, the defendant may not constitutionally be convicted. The trial court must dismiss the case. If there has been a conviction, it must be reversed on appeal.

The circumstances of this case, as we have shown *supra,* more clearly bespeak a denial of due process than those posited in the *Earl* hypothetical. For here, there was not only the discriminatory invocation of the immunity statute, but also the Government's unannounced grant to the witness of *de facto* immunity. There is, therefore, ample basis here for a reversal of Petitioner's conviction.[8]

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[8] Since, in the posture of this case, Petitioner's conviction can be reversed for the Government's improper use of the im-

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If there were no basis for reversal here for unlawful application of the immunity statute, there would still be presented the question, whether, having frustrated Petitioner's attempt to adduce the testimony of Friedman, the Government should be permitted to rub salt in Petitioner's wounds by calling the jury's attention to the absence of the testimony. We submit that, under the reasoning of *Kastigar,* it is overwhelmingly apparent that the Government, by refusing to invoke the use immunity statute on a defendant's sufficient showing of necessity, procures for itself a grossly unfair advantage to which, on any acceptable legal theory, it is not entitled. That being so, this Court should consider whether, in such a case, the trial court has a duty to explain to the jury the reason for the unavailability of the testimony the accused as proffered. *A fortiori,* we submit, there should be a duty to prevent the Government from increasing its ill-gotten advantage by commenting on the absence of testimony.[9]

---

munity statute, as suggested in *Earl,* no consideration need be given to the larger issue: whether, when dealing with mere *use* immunity, rather than the *transactional* immunity involved in *Earl,* there is judicial power to fashion a procedure to provide the accused with testimony necessary to his defense while not depriving the Government of anything to which it is entitled.

[9] In light of that judicial obligation, the accused's failure to remonstrate against the Government's argument should not be dispositive.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. DOMINIC ALESSIO, *Appellant.*	Nos. 73-2904 and 74-1550 OPINION

{January 14, 1976}

Appeal from the United States District Court for the Central District of California

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Before: MERRILL and GOODWIN, Circuit Judges, and WOLLENBERG* District Judge

WOLLENBERG, District Judge:

Appellant Dominic Alessio and Anthony Santiago were charged in a three-count indictment returned De-

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*Honorable Albert C. Wollenberg, United States District Judge, Northern District of California, sitting by designation.

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cember 7, 1972. Appellant was charged in Count One with having given items of value to Santiago with the corrupt intent to influence official acts of Santiago, in violation of 18 U.S.C. §201(b). Count Two charged appellant with giving these items of value to Santiago "for and because of official acts performed by and to be performed by" Santiago, in violation of 18 U.S.C. §201(f). Count Three charged Santiago with receiving these same items of value "for and because of official acts" performed and to be performed, in violation of 18 U.S.C. §201(g). Santiago pleaded guilty to Count Three and subsequently testified on behalf of the United States at appellant's trial. A jury acquitted appellant on the first count and convicted him on the second.

FACTS

Anthony Santiago was Camp Administrator at the Lompoc Prison Camp (hereinafter "the Camp"), a minimum security institution for federal prisoners. Appellant's father John Alessio was an inmate at the Camp from approximately May 1971 until February 12, 1972, having been convicted of income tax evasion. As Camp Administrator, Santiago was in a position to confer upon inmates of the Camp certain benefits, including trips off the Camp premises.

In June 1971 Santiago and his family left for a vacation in Las Vegas and San Diego. During this vacation many hotel bills, restaurant bills, and other expenses incurred by Santiago were paid by appellant and by Maurice Friedman, another inmate at the Camp. Ap-

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pellant's payments to, or on behalf of, Santiago form the basis of the bribery conviction.

A number of issues are raised on appeal, not all of which merit or will receive discussion. Appellant's principal claims are:

1) The government improperly failed to seek immunity for certain defense witnesses and the court improperly failed to grant the immunity in the absence of a motion from the government.

2) The evidence was insufficient to support the judgment.

3) The indictment was invalid because the prosecuting attorneys were not authorized to seek the indictment from the grand jury.

4) The jury was improperly exposed to prejudicial publicity during the trial.

None of these claims has merit, and the judgment will therefore be affirmed.

IMMUNITY FOR PROSPECTIVE DEFENSE WITNESSES

Appellant's most interesting argument on appeal is that he was denied important Fifth and Sixth Amendment rights by the government's refusal to seek immunity for prospective defense witnesses pursuant to 18 U.S.C. §§6001, et seq. At trial appellant unsuccessfully asked the government to invoke the immunity statute, *supra*, to compel the testimony of three witnesses whose testimony he claimed was crucial for his defense: Maurice Friedman, Daniel Morgan, a Camp correctional officer, and Roy Goddard, formerly a Camp case worker.

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It has repeatedly been held by this Court that the government may not be compelled to seek a grant of immunity for a prospective defense witness. *United States v. Bautista*, 509 F.2d 675, 677 (9th Cir. 1975); *Cerda v. United States*, 488 F.2d 720 (9th Cir. 1973); *United States v. Jenkins*, 470 F.2d 1061 (9th Cir. 1972). It was noted in *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966), however, that a defendant might be denied due process if the government uses its authority to seek immunity for its own witnesses, but declines to do so on behalf of the defendant. 361 F.2d at 534 n.1. The problem was raised only hypothetically by the court in *Earl* because, like in *United States v. Bautista, supra*, the government had secured none of its own witnesses through a grant of immunity. In the present case the government sought and obtained immunity for one prosecution witness. Appellant claims the government's refusal to exercise on behalf of the defense its authority to seek immunity for witnesses denied him due process under the Fifth Amendment, *Brady v. Maryland*, 373 U.S. 83 (1963), and denied him his Sixth Amendment right "[i]n all criminal prosecutions . . . to have compulsory process for obtaining witnesses in his favor . . . ." Further discussion of the facts is necessary to understand the Court's resolution of this issue.

Maurice Friedman, one of the persons whose testimony appellant hoped to obtain through a grant of immunity, was an inmate at the Camp. Friedman and appellant's father were close friends at the Camp; they roomed together and were frequently seen together. Appellant claims Friedman would have corroborated

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appellant's testimony that appellant provided gifts and other amenities to Santiago solely at Friedman's request, that such requests are routinely made in the gaming industry Friedman and appellant were involved in, and that it was a common business practice in that industry to comply with such requests. Appellant's argument here is that the government's refusal to seek immunity to obtain Friedman's testimony denied appellant valuable exculpatory evidence because the testimony would have shown that the gifts and other amenities given Santiago by appellant were solely in response to requests from Friedman and not for or because of official acts to be done by Santiago as charged in the indictment.

Daniel Morgan, another person whose testimony appellant sought to obtain through a grant of immunity was a Camp correctional officer who appellant claims would have testified he twice took appellant's father on trips off Camp premises, that he had no knowledge that appellant's father was prohibited from traveling off Camp premises, and that in the past he had given other inmates the same allegedly favored treatment received by appellant's father.

Roy Goddard, the third prospective witness for whom appellant sought immunity, was a former Camp case worker who appellant claims would have testified that a furlough request made by appellant's father was processed in the normal manner and that appellant's father, therefore, did not receive special treatment from Camp officials.

It has long been recognized that the Executive Branch of government "has exclusive authority and absolute

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discretion to decide whether to prosecute a case . . . ." *United States v. Nixon*, 418 U.S. 683, 693 (1974), and authorities cited therein; *Smith v. United States*, 375 F.2d 243 (5th Cir. 1967), *cert denied*, 389 U.S. 841 (1967). The right to compulsory process under the Sixth Amendment must be exercised consistent with the government's power to determine which cases will be prosecuted. This power has its roots in the Executive's constitutional duty to take care that the laws of the United States be faithfully executed. U.S. Const. Art. II, Sec. 3; *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965), *cert denied sub nom. Cox v. Hauberg*, 381 U.S. 935 (1965). To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions. Of course, whatever power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment. The footnote in *Earl v. United States*, *supra*, on which appellant relies heavily says no more than this. The key question, then, is whether appellant was denied a fair trial because of the government's refusal to seek immunity for defense witnesses.

We are not convinced that appellant was denied a fair trial in this case. The testimony sought by appellant was cumulative of the testimony of other witnesses. The jury had before it all the facts and claims appellant intended to elicit from the witnesses for whom he sought

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immunity. The trial was not rendered unfair because of the absence of these witnesses' testimony, and appellant was therefore not denied due process.

SUFFICIENCY OF THE EVIDENCE

Appellant claims the evidence was insufficient to show a violation of 18 U.S.C. §201(f) and that the language of the statute failed to advise appellant of what conduct would constitute a violation. The acts charged in the indictment in this case are a violation of the federal bribery statute that was revised in 1962. Section 201(f) has consistently been interpreted as not requiring a quid pro quo before payments to officials are unlawful.

In *United States v. Barash*, 412 F.2d 26 (2d Cir. 1969), *cert. denied*, 396 U.S. 832 (1969), the Court of Appeals for the Second circuit held it was a violation of Section 201(f) for a tax attorney representing clients in audits before the Internal Revenue Service to make payments to tax auditors, "whether the payments were made because of economic duress, a desire to create a better working atmosphere, or [in] appreciation for a speedy and favorable audit." 412 F.2d at 29. Clearly, the intent necessary to establish a violation of this section may be present whether or not there was an agreement between appellant and Santiago regarding particular acts Santiago had performed or would perform. To support the jury's verdict the evidence must show that something of value was given "a public official . . . for or because of any official act performed or to be performed by such public official . . . ." 18 U.S.C. §201(f). An " 'official act' means any decision or action on any question, mat-

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ter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit." 18 U.S.C. §201(a).

The evidence overwhelmingly supports the conviction of appellant under these standards. The jury could properly conclude from the testimony at trial that appellant knew Santiago was in a position to use his authority in a manner which would affect the conditions of confinement of appellant's father. The jury could fairly conclude from the record herein that things of value were given Santiago by appellant "for or because of" Santiago's exercise of that authority; that is, "for or because of any official act performed or to be performed by" Santiago. The evidence is sufficient to establish that things of value were furnished Santiago "otherwise than as provided by law for the proper discharge of official duty." 18 U.S.C. §201(f). The evidence supports the jury's conclusions as to intent and the substantive elements of the offense.

We reject appellant's claim that the language of the statute fails to advise persons of what acts the statute forbids. The language of the statute clearly and adequately expresses its purposes. *United States v. Irwin*, 354 F.2d 192, 196 (2d Cir. 1965). Accordingly, the statute as applied here is not constitutionally vague.

PROSECUTORS' AUTHORITY TO SEEK INDICTMENTS

Appellant claims the District Court erred by failing to dismiss the indictment on the basis of the government's

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alleged violation of Rule 6(d) of the Federal Rules of Criminal Procedure. He argues that the prosecutors who presented his case to the grand jury which returned the indictment were not "attorneys for the government" within the meaning of that rule and that the indictment returned was therefore invalid.

The principal basis for appellant's argument is that 28 U.S.C. §515 should be strictly construed against enlarging the number of persons with access to grand juries on behalf of the government and that the authorizations of the special prosecutors in this case were insufficient under the rationale of *United States v. Crispino*, 392 F.Supp. 764 (S.D.N.Y. 1975). That case has been reversed without opinion by the Second Circuit. 517 F.2d 1395 (1975). Appellant's arguments must be rejected in light of *In re Subpoena of Persico*, 552 F.2d 41 (2d Cir. 1975), and *United States v. Wrigley*, 520 F.2d 362 (8th Cir. 1975). The motion to dismiss the indictment was properly denied.

JURY EXPOSURE TO PUBLICITY DURING TRIAL

In a consolidated appeal, appellant challenges the trial judge's denial of a motion for a new trial based on the alleged circulation and discussion in the jury room of prejudicial newspaper articles. Whether a new trial should be granted on this basis is a matter within the discretion of the trial judge and must turn on all the facts and circumstances of each case. *Marshall v. United States*, 360 U.S. 310, 312 (1959). The question here is whether the information which allegedly reached the

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jury was so prejudicial that appellant was denied a fair trial. *See* American Bar Association, Standards Relating to Fair Trial and Free Press §§3.4(b) and 3.5(f) (Approved draft 1968).

The Court has read each of the newspaper articles which, according to appellant, appeared in Los Angeles area newspapers and could have prejudiced the jury. In our view, these articles are not so inflammatory or prejudicial that they would have interfered with the jury's ability to render a fair verdict based on the evidence before them. The trial judge conducted several hearings during which the jurors and alternates were questioned about their exposure to this publicity, and his decision to deny the motion for new trial was not an abuse of discretion.

CONCLUSION

None of the issues raised by appellant has merit. The jury's verdict was supported by the evidence, and we find no error in the rulings of the trial judge. Accordingly, the conviction is AFFIRMED.

APPENDIX B

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff Appellee,*	
VS.	Nos. 73-2904 and 74-1550
DOMINIC ALESSIO, *Defendant Appellant.*	(DC CRIM. 11922 MML)

Appeal from the United States District Court
for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered
January 14, 1976

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*	)	
vs.	)	No. 73-2904 No. 74-1550
DOMINIC ALESSIO, *Appellant.*	)	ORDER

Before: MERRILL and GOODWIN, Circuit Judges, and WOLLENBERG, District Judge

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The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

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APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*	
vs.	No. 73-2904 74-1550
DOMINIC ALESSIO, *Appellant.*	D.C. No. 11922

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Thomas P. Nugent, Esq., counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before March 25, 1976.

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In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Albert C. Wollenberg
United States Judge.

DATED: SAN FRANCISCO, CALIF.
March 1, 1976

Supreme Court, U. S.
FILED
JUL 16 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1363

UNITED STATES OF AMERICA

v.

DOMINIC ALESSIO, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

THOMAS P. NUGENT, Esquire
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1363

UNITED STATES OF AMERICA

v.

DOMINIC ALESSIO, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered June 21, 1976, and (2) granting the petition.

After the filing of this Petition for Writ of Certiorari, the Third Circuit, in *U.S.* v. *Morrison*, C.A.3d, April 27, 1976, recognized that under some circumstances, if the Prosecution refuses to apply for use immunity on behalf of a defense witness, the trial court must enter a judgment of acquittal. See *Earl* v. *U.S.*, 361 F.2d 531 (D.C. Cir. 1966). In the case at bench, the trial court felt it lacked authority to deal with the

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Prosecution's refusal. On appeal, the Ninth Circuit stated that the right of Petitioner to obtain witnesses "... must be exercised consistent with the government's power to determine which cases will be prosecuted."

Petitioner was convicted of giving an illegal gratuity to an official of the Lompoc Minimum Security facility. Petitioner testified that he acted not on personal motive, but in compliance with a request from Maurice Friedman. Petitioner sought use immunity for Friedman to bring that exculpatory evidence before the jury. The Prosecution refused.

Has the Court's calendar become so crowded that it is incapable of considering violations of the Constitution and a resulting improper conviction? We are not here concerned with a mere difference of opinion between a defendant and a district court; the Circuits are in conflict in approaching use immunity questions. Without addressing itself to use immunity, the Ninth Circuit allowed the Prosecution to control the use immunity process in contravention of the right to obtain witnesses secured by the Sixth Amendment and right to due process secured by the Fifth Amendment.

We have yet to receive a judicial response that suggests the consideration due Petitioner's contention set out in the following few paragraphs. Nor has the Government been required to file a brief, explaining its prosecutorial interests in use immunity.

Had the District of Columbia Circuit or Third Circuit been confronted with the facts of the case at bench, the judgment would not have been affirmed be-

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low since the following facts would have controlled:

(a) The prosecutor immunized a prosecution witness (Petition for Writ at page 10), but refused the defendant's request to immunize defense witnesses.

(b) The prosecutor convinced potential defense witness Goddard to assert the Fifth Amendment by referring to him as "this defendant," repeating warnings about a pending indictment and self-incrimination, and advising him that questions would be asked regarding his culpability; all this after Goddard had presented himself to the court, after the Court's warnings, "to be of help to anybody, you know, who's here." (Reporter's Transcript at 1070, 1074, 1083.)

(c) By refusing to allow the trial court to consider immunizing Friedman, the prosecution kept out Friedman's testimony that he had requested petitioner to supply the official with complimentary accommodations, and that it was the custom in the restaurant-hotel industry to make and summarily honor such requests.

(d) Friedman was the subject of an extensive investigation and the Government had determined not to prosecute him.

(e) The prosecution argued to the jury that there was no evidence that Friedman was, in any manner, involved.

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CONCLUSION

In contending that the Prosecution violated his constitutional rights by intimidating a defense witness into asserting the Fifth Amendment, using the immunity power only to obtain a witness for the Prosecution, and by commenting upon the absence of exculpatory evidence when the Prosecution had blocked its entry, Petitioner has asked:

1. What does the Prosecution lose when a witness is granted use immunity?

2. When and how may the Prosecution permissibly profit by barring exculpatory evidence?

These are only two of the use immunity questions presented. Because the Ninth Circuit either failed to answer, or provided answers which are in conflict with other Circuits, the denial of certiorari should be reconsidered to the end that Petitioner's conviction be evaluated on the basis of definitive standards for the utilization of the use immunity power by the Government.

Respectfully submitted,

HASKINS, LEWIS, NUGENT &
NEWNHAM
THOMAS P. NUGENT, Esq.
ROGER W. KRAUEL, Esq.
By _____
Thomas P. Nugent
Attorneys for Petitioner

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CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2).

Executed this 8th day of July, 1976, at San Diego, California.

THOMAS P. NUGENT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2060

UNITED STATES OF AMERICA
v.
WALTER MORRISON a/k/a "Skip" Morrison, et al.

Nick Boscia, Appellant

(D.C. Criminal No. 75-28)

APPEAL FROM THE JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted January 15, 1976
Before GIBBONS, FORMAN and ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed April 27, 1976)

Blair A. Griffith, Esq.,
United States Attorney
James A. Villanova, Esq.,
Assistant United States Attorney
James J. West, Esq.
Assistant United States Attorney
633 U.S. Post Office & Courthouse
Pittsburgh, Pennsylvania 15219
Attorneys for Appellee

Joel S. Perr, Esq.,
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306 Fourth Avenue
Pittsburgh, Pennsylvania 15222
Attorney for Appellant

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Forman, *Circuit Judge.*

Appellant Nick Boscia was found guilty after a jury trial on two counts, conspiracy to distribute and distribution of approximately 856.5 grams of hashish in violation of 21 U.S.C. §§841(a), 846.

The only issue on appeal is whether appellant was denied a fair trial in that he was deprived of his constitutional right to call witnesses in his defense by the actions of Mr. Villanova, the Assistant United States Attorney. The trial judge heard sworn testimony, out of the presence of the jury, from the lawyers for the defendants (Mr. Boscia was tried with two co-defendants; other indicted conspirators pled guilty), and from Mr. Villanova. Though clearly troubled by the case and terming the actions of the Assistant United States Attorney "improper," the judge denied a motion for mistrial made during the trial and motions made after trial for judgment of acquittal or alternatively for a new trial.

I

The story that emerges from study of the record, including the testimony given at the evidentiary hearing, is that defendant, Mr. Boscia, and his lawyer planned his defense around the testimony of Sally Bell, Mr. Boscia's girl friend, who allegedly was prepared to swear that it was she and not Mr. Boscia who had been involved in the conspiracy to sell hashish. As the pair told the story to Joel S. Perr, Esq., Mr. Boscia's court-appointed lawyer, Mr. Boscia's involvement

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was minimal and incidental and he decided to reject the plea negotiations and go to trial. Ms. Bell was originally indicted with Mr. Boscia and others but charges were dropped against her when it was disclosed that she had been under eighteen years at the relevant time. She seems to have understood that with the dropping of federal charges she was free from prosecution for her role in the conspiracy. This, however, was not true. Under 18 U.S.C. §5302 she could still be charged as a juvenile in state court, which is now the usual forum for all federal juvenile offenders, and if the state declined to prosecute her, she could be prosecuted by permission of the United States Attorney General in the federal court.

On the morning that the trial commenced, Monday, April 14, 1975, Ms. Bell assured defense counsel that she was willing to testify. Mr. Boscia's lawyer, not sure of the status of the charges against her but aware there might be conflict between her interest and that of his client, requested the court to appoint counsel for her or grant her immunity. This was opposed by Mr. Villanova. He stated that he was not going to call Ms. Bell and, should the defense do so, a warning by the court of her rights would be sufficient protection.[1] The judge said the court would instruct her on her rights, but expressed doubt as to whether he could appoint counsel for a witness or grant immunity except on motion of the Government.[2]

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1. Transcript at 4.
2. Transcript at 4-7.

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During the next few days Mr. Villanova appears to have had a change of mind as to the protection he considered that Ms. Bell needed. On at least three occasions he sent messages to her through defense counsel warning that she was liable to be prosecuted on drug charges; that if she testified, that testimony would be used as evidence against her and, further, that as she was now eighteen it would be possible to bring federal perjury charges against her.[3] Not content that these messages would adequately alert her to her peril, he sent a subpoena to Ms. Bell and had her brought into his office on Wednesday, April 16.[4] The subpoena would not appear to have had any legal validity as it was made out for a day already past. Originally addressed to Mike McBride, his name had been scratched out and Sally Bell's inserted instead. The only purpose of the subpoena would therefore seem to have been to impress Ms. Bell with the force of the law with which she was entangling. There, surrounded by the three law-enforcement officers who had served as undercover agents in the case and whose testimony

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3. Transcript at 303, 306, 350-1, 351-2, 371.

4. Appellant's brief states (p. 5-6) that Mr. Villanova subpoenaed and interviewed Miss Bell on the morning of Thursday, April 17; that this occurred after the Government had rested its case (Wednesday, April 16), and immediately before she was called to the stand to testify; that at the interview she was asked "what testimony she would offer *that* morning to the jury" (emphasis added); and that court was called to order and Sally Bell to the witness stand as first defense witness immediately after this interview. The Government's brief fails to challenge the accuracy of this timing of the questioning of Sally

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Sally Bell was meant to undermine in court, he once again impressed upon her the dangers of testifying.

At this interview Mr. Villanova, according to his testimony, advised Ms. Bell of her rights. He testified that

> "Some of the rights I couldn't remember myself, even though I'm an attorney, and the police officers told me what to tell her as far as her rights, her right not to testify, not to say anything to me, her rights to have an attorney present, her right to remain silent even after she said something . . . . . I told her that if she admitted she was part of this thing that she could in fact be prosecuted as a juvenile in state court, and I told her that if she could not be prosecuted as a juvenile in state court that she could be prosecuted possibly, with the permission of the attorney general, as a juvenile in federal court, and I told her that she should know that before she went up to the witness stand and confessed.
>
> "I also told her that if she testified falsely that she could subject herself to a perjury charge, and I told

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4. (Cont'd.)
Bell by Mr. Villanova. However, the record shows that Mr. Villanova, at the evidentiary hearing held immediately after Sally Bell's testimony on the morning of April 17, stated "I talked to her in our office *yesterday* (emphasis added) and advised her of her rights." (Transcript at 377). It is also clear from his examination of Ms. Bell at the evidentiary hearing that the interview had taken place the previous day (Transcript at 389). The District Court accepted Mr. Villanova's testimony as true. We also accept it as true and reject as inaccurate the statement of facts in pp. 5, 6 of Attorney Perr's brief for Mr. Boscia.

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her that even though the charges were dismissed against her as an adult on the dope charge itself, that if she testified falsely she was now an adult over 18, and if we could prove it, and she was testifying falsely on behalf of Nick Boscia thinking to get her to lie to exculpate himself and get off the hook, she could be prosecuted for perjury, and she should know that." Transcript at 377-9.

Ms. Bell seems to have felt increasingly intimidated under this barrage of warnings.[5] When she was called to the stand on the morning of Thursday, April 17, though she answered many of the questions fully and intelligently, there were more than thirty questions which she refused to answer on the ground that the answers might incriminate her, thus depriving appellant of much of the evidence he had expected to place before the jury. After Ms. Bell's testimony, Judge Knox held the before-mentioned evidentiary hearing at which the defense attorneys, Mr. Villanova and Ms. Bell testified under oath.

II

The Supreme Court has stated:

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain

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5. Mr. Perr testified: "Now, on late Tuesday Miss Bell indicated to me that she felt intimidated by the remarks and she was getting to a point where she was scared to testify." Transcript at 352.

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terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14 at 19 (1967).

This right is found specifically in the Sixth Amendment right to compulsory process.[6] A recent commentator[7] has traced the development of the compulsory process clause finding that at the time of its adoption it stood for the principle that "a defendant should have a meaningful opportunity, at least on a par with that of the prosecution[8] to present a case in his favor through witnesses." Mr. Boscia alleges that the actions of Mr. Villanova denied him this right. We agree.

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6. In *Washington v. Texas* the Supreme Court held that the right is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment. Some cases since then have been based on the Due Process Clause without reference to the Sixth Amendment e.g. *Webb v. Texas*, 409 U.S. 95 (1972).

7. Western "The Compulsory Process Clause" 73 Michigan Law Review 71 (1974).

8. The District Court pointed out to Mr. Villanova, "If a defense counsel would go to a witness you would want to go to a grand jury about it." Transcript p. 386.

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The grounds on which the District Court denied Mr. Boscia's motions were that Mr. Villanova's actions were done in good faith, did not cause any substantial prejudice to Mr. Boscia and did not deprive him of any right to which he was entitled. We believe that the Supreme Court decision in *Webb v. Texas*, 409 U.S. 95 (1972) stands directly in the way of the District Court's conclusion and must control this case.

In *Webb*, the Supreme Court reversed the Texas Court of Criminal Appeals and found the defendant had been denied due process where the trial judge gratuitously and unnecessarily singled out the defendant's only witness for a lengthy admonition on the dangers of perjury, assuring the witness that if he lied he would be prosecuted and probably convicted of perjury, that the resulting sentence would be added onto the one he was serving and impair his chances of parole. After this warning, the witness had refused to testify and was excused by the court.

The District Court sought to distinguish *Webb* on the grounds that the witness in that case had been driven from the stand by the judge's warning whereas Sally Bell testified freely to non-incriminating matters before the jury and testified out of jury hearing on the conversation she had with Mr. Villanova. We do not find these distinctions relevant to the issue of whether the actions of the prosecutor interfered with Mr. Boscia's right to have his witness give evidence in his favor.

The District Court found that the remarks of Mr. Villanova were the cause of Sally Bell's choice not to

incriminate herself.[9] Such a finding would seem indeed mandated by the burden of proof established for such a question in *Webb*. There the Texas Court of Appeals had held there was no showing that the witness had been intimidated by the admonition or refused to testify because of it. The Supreme Court disagreed, 409 U.S. at 97, 98. It said:

> "The fact that Mills was willing to come to court to testify in the petitioner's behalf, refusing to do so only after the judge's lengthy and intimidating warning, strongly suggests that the judge's comments were the cause of Mills' refusal to testify. . . . .
>
> "In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment."

The actions of the prosecutor in his repeated warnings which culminated in a highly intimidating personal interview were completely unnecessary. A warning of rights by the court prior to Sally Bell's tes-

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9. "The court observes that although *the remarks by the Assistant United States Attorney did cause Sally Bell to choose not to incriminate herself*, she was not so intimidated as to refuse to report these matters to the court and to testify as to the conversation that she had had with the Assistant United States Attorney. Likewise she testified to the jury as to many relevant matters . . . . ." Unpublished opinion filed 8/12/75 at pp. 7-8 (emphasis added).

timony would be adequate protection against an unknowing waiver of her right against self-incrimination, and the District Judge stated on the first day of trial that he would give such a warning. The good faith of the Assistant United States Attorney would be relevant if *he* were charged with violation of 18 U.S.C. §1503 which makes the intimidation of a federal witness a criminal offense. It is not, however, relevant to an inquirty into whether a *defendant* was denied his constitutional right.

Nor does the opinion of the District Court that "corroboration of Boscia's story by Sally Bell could not have affected the verdict"[10] excuse the infringement of Mr. Boscia's rights. The District Court states that Boscia had "admitted every element of the crime charged except intent and had admitted a great deal of facts from which the jury could infer intent." Mr. Boscia still had the right to put before the jury facts to contradict that intent. Prior to trial the District Court had refused to accept a guilty plea from Mr. Boscia because there was insufficient basis for the plea on the facts that Boscia would admit.[11]

In *Webb* the defendant had been surprised during an armed robbery and held by the wounded victim at gunpoint till the police arrived. As Justice Blackmun's dissent, in which Justice Rhenquist joined, points out, there was "overwhelming evidence of guilty", 409 U.S. at 99. But the majority of the Court ignored that

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10. Opinion at 10.

11. Transcript at 360.

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fact, apparently finding it irrelevant, and reversed the conviction as an infringement of the petitioner's due process rights. *Accord U.S. v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973). Thus where the Government has prevented the defendant's witness from testifying freely before the jury, it cannot be held that the jury would not have believed the testimony or that the error is harmless.

Although as a general rule there is no duty to advise a *witness* in court or at a grand jury proceeding of his right not to incriminate himself, 98 CJS *Witnesses* §44 (1957); *U.S. v. Luxenberg*, 374 F.2d 241 (6th Cir. 1967), it is entirely proper for the court in its discretion to issue such warnings. In this case, the defense counsel had raised the problem with the court at the very opening of trial. The court had said it would instruct Sally Bell on her rights and did in fact do so at the appropriate time. [12] The actions of Mr. Villanova were totally unnecessary. Ms. Bell could have made a knowing choice of whether to testify or not on the basis of the formal warning from the court. The pressure brought to bear on her by the Assistant United States Attorney interfered with the voluntariness of her choice and infringed defendant's constitutional right to have her freely-given testimony.

This case seems clearly ruled by *Webb*. True, it was the trial judge in that case who "effectively drove that [the defendant's] witness off the stand." 409 U.S. at 98. Here it was the influence of the Assistant United

12. Transcript at 309-10.

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States Attorney, Mr. Villanova, a figure somewhat lower in the hierarchy than the trial judge but nonetheless the symbol of the Government's power to prosecute offenders. However good the trial judge found the intentions of Mr. Villanova, his bizarre conduct toward a witness for the defense is not to be condoned. It was without doubt responsible for the course pursued by Sally Bell in refusing to testify and to that extent deprived Mr. Boscia of due process of law under the Fourteenth Amendment. Under such circumstances the order of the United States District Court for the Western District of Pennsylvania filed August 12, 1975, denying the motion for a new trial will be reversed.

III

There remains the question of whether a fair trial of Mr. Boscia can now be held or whether the harm done by Mr. Villanova's actions is irreparable.[13]

When defense counsel at the opening of the trial, before any untoward circumstance had occurred, requested immunity for Sally Bell, the District Court correctly stated that immunity is granted only at the request of the United States. 18 U.S.C. §6003 empowers the District Court to grant immunity "upon the request of the United States attorney for such district." The conflict between the right of a defendant to pro-

13. Judge Knox during the evidentiary hearing stated, "One of the things I wonder about is if a fair trial can ever be held in this case." Transcript at 386.

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duce evidence in his favor and the right of witnesses not to incriminate themselves has been raised in many cases when a defendant has sought to obtain immunity for his witness. The courts have invariably held that they lack power to grant immunity except on request of the Government. *U.S. v. Berrigan*, 482 F.2d 171, 190 (3d Cir. 1973); *U.S. v. Allstate Mortgage Corp.*, 507 F.2d 492 (7th Cir. 1974); *cert. den.* 421 U.S. 999.

The rationale for this unavailability of immunity to a witness at the defendant's request has been characterized thus: "A person suspected of crime should not be empowered to give his confederates an immunity bath." *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973). However, 18 U.S.C. §6002 does not provide an "immunity bath" for witnesses but merely provides "use immunity," so that no testimony compelled by the grant of immunity, nor any information directly or indirectly derived from such testimony, may be used against the witness in a subsequent prosecution other than for perjury. The Supreme Court in *Kastigan v. United States*, 406 U.S. 441 (1972) held that a grant of use immunity affords adequate protection of a witness' right not to incriminate himself and enables the Government to compel the witness to testify.

There are circumstances under which it appears due process may demand that the Government request use immunity for a defendant's witness. See *Dicta* in *U.S. v. Leonard*, 494 F.2d 955, 985 n.79 (D.C. Cir. 1974) (concurring and dissenting opinion of Bazelon C.J.); and *Cf. Earl v. U.S.*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966) (Burger J.). Such a circumstance was created in

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this case when prosecutorial misconduct caused the defendant's principal witness to withhold out of fear of self-incrimination testimony which would otherwise allegedly have been available to the defendant.

At the new trial, in the event that the defendant calls Sally Bell as a witness, if she invokes her Fifth Amendment right not to testify, a judgment of acquittal shall be entered unless the Government, pursuant to 18 U.S.C. §§6002, 6003, requests use immunity for her testimony.

Rosenns, *Circuit Judge*, Dissenting

The Assistant United States Attorney may have acted imprudently and perhaps reprehensibly in his conference with Sally Bell, but I do not believe his actions denied the defendant Boscia a fair trial. A defendant has the right to have his witnesses testify free from intimidation. A defendant, however, may not complain when his witness freely exercises the privilege to plead the fifth amendment. I, therefore, respectfully dissent.

Sally Bell was originally indicted with Boscia and others, but the charges against her were dismissed at the instance of the Government when it was discovered that she was under eighteen years of age at the time of the alleged offense. She apparently understood that with the dropping of the federal charges, she was relieved from prosecution for her role in the con-

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spiracy. As the majority point out, "[t]his, however, was not true. Under 18 U.S.C. §5302 she could still be charged as a juvenile in state court, which is now the usual forum for federal juvenile offenders, and if the state declined to prosecute her, she could be prosecuted by permission of the United States Attorney General in the federal court." Majority Opinion, pp. 2-3.

Sensing that the defense strategy was to unload all responsibility for the alleged violations upon Ms. Bell, the indictment against her having been dismissed, and knowing she was without counsel, Mr. Villanova, the Assistant United States Attorney, sent her messages through Boscia's counsel, Mr. Perr. The exact language of the messages is in dispute, but the gist was that the dismissal of the indictment against Ms. Bell was not necessarily a final disposition of her case. Mr. Villanova further informed Mr. Perr that he expected the state court to proceed against Ms. Bell as a juvenile; that, absent such prosecution, he would seek permission from the Attorney General to prosecute her in the federal court; and that since she was now eighteen years of age, if she took the stand in behalf of the defense and lied, she could be prosecuted for perjury.

The Assistant United States Attorney became concerned that Boscia's lawyer had not passed this information on to Ms. Bell.[1] He thereupon had her brought to his office under subpoena at the close of the Govern-

1. As the case unfolded, there was ample basis for his concern. At the evidentiary hearing conducted by the trial judge out of the presence of the jury, Ms. Bell testified:

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ment's case and, in the presence of several law enforcement officers, personally advised her of her rights and of the perils of testifying falsely. Despite these admonitions and any feelings of intimidation which she may have had at that time,[2] she appeared in court in behalf of the defense. Upon being sworn, the following colloquy took place between her and the trial judge:

THE COURT: Miss Bell, it is my duty to warn you

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1. (Cont'd.)

BY MR. VILLANOVA:

Q.: You are still under oath. Now, Miss Bell, did you realize before I told you yesterday that if you testified and in effect confessed to some implications that you had in this yourself, did you realize that you were subject to any future prosecution on this?

A.: No, sir. It was my understanding that all the charges were dropped and that was on the state and federal level.

Q.: Let me ask you this.

THE COURT: I don't think she finished.

THE WITNESS: That was all.

THE COURT: All right. Go ahead.

BY MR. VILLANOVA:

Q.: Continue.

A.: And I didn't think these charges could be brought up again, the same charges against me.

Q.: You didn't know that the federal government has the power to prosecute people as juveniles?

A.: It was my understanding that they were dropped completely and it wasn't going to go to the state level or federal level.

2. Although the majority opinion suggests that Ms. Bell "felt increasingly intimidated" partly as a result of the interview with Villanova (p. 5), Perr's testimony was that she expressed feelings of intimidation the day before the interview, not thereafter.

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that under the Fifth Amendment of the United States Constitution you cannot be compelled to testify to any matters that you feel might incriminate you, and therefore, on those matters you would have a right to remain silent. If, however, you elect to testify, anything you say might be used against you in court. You do have the right to have an attorney advise you if you wish to testify or not.

SALLY BELL: Yes, sir, I'll testify.

THE COURT: Do you want an attorney?

SALLY BELL: No.

Ms. Bell thereupon testified for the defense. An examination of the transcript of her testimony reveals that she responded to questions of counsel and court "fully and intelligently."[3] She selectively refrained from answering any questions which she thought might incriminate her.

Under these circumstances, I cannot agree with the majority that the repeated warnings of the Assistant United States Attorney to Ms. Bell, culminating in his personal interview with her, had any intimidating effect upon her. She appeared in court for the defense; she testified for the defense, and when she refused to respond to certain questions, she was exercising her fifth amendment privilege precisely as she was instructed in court by the trial judge.

This young lady was obviously a perceptive, bright, and alert witness. The testimony she did give

3. See majority opinion, p. 5.

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disclosed that she had considerable information about the alleged conspiracy and that she also might have been involved as a principal. For example, she testified readily as to the arrangements made on June 26, 1974, at the McBride (a co-defendant) apartment, for purchase of hashish at Penn State by Malloy. She gave the names of those who were present and who were to drive Malloy there to make the purchase. She also testified on direct examination that she knew what was to take place at State College but, when asked how she knew, she replied "I'll take the Fifth Amendment."

She further testified that the defendant Boscia was present when the arrangements were made and that she was present when Boscia returned that evening from State College. Notwithstanding her fifth amendment plea, when Mr. Perr asked her whether Boscia told her what had in fact occurred at State College that evening, she replied affirmatively as follows:

> A.: Mr. Upton and Mr. Ramsley and Mike McBride and Nick Boscia drove up.
> Q.: Drove where?
> A.: To State College, Pennsylvania, and they met Skip—Walter Morrison, and Mr. Upton and Mr. Ramsley purchased the hashish, and they drove back. They came back.

Intimidation, especially in the context in which the term is used under the facts of this case, is not a mechanistic process in which equal pressures applied to different persons achieve identical results. Pressures which overawe the weak or sear the sensitive may be

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hurled aside by the strong or totally disregarded by the dullard. The extent if any, to which the pressure is effective depends upon the response of the person to whom it is directed. At issue, therefore, is the reaction of the witness under the force of the alleged pressure.

I see nothing in Ms. Bell's conduct or testimony which reveals fright or any semblance of intimidation on her part. She impresses me an an intelligent and strong personality. Only when she thought her testimony might incriminate her personally did she refuse to respond. The district court made no finding that she was intimidated. The district court's observation (see note 9, majority opinion) that Ms. Bell chose not to incriminate herself because of the remarks of the Assistant United States Attorney does not mean that she was acting under coercion or intimidation. She gave her testimony self-reliantly and under the protective arm of the court. Moreover, she could not state that she would not have taken the fifth amendment even if Mr. Villanova had not warned her.[1]

I find *Webb v. Texas*, 409 U.S. 95 (1972), distinguishable. In that case, the defendant's only witness refused to testify and did not take the stand after a lengthy admonition by the trial judge on the dangers

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4. At the evidentiary hearing, Ms. Bell testified, in response to a question from Mr. Villanova as to whether she would not have taken the fifth amendment regardless of his warnings to her, knowing as she now did, that she was opening herself up "to juvenile prosecution and so forth,"

A.: I don't know. I am not sure right now. I would have to think about it.

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of committing perjury and its possible effect on his current prison sentence and parole. The judge in that case threatened the witness when called by telling him that "[i]f you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the liklihood [sic] is that you would get convicted of perjury and that it would be stacked onto what you have already got . . . ." In the instant case, however, there was merely an admonition; it was not by the trial judge, not in court, and in fact, the witness did not refuse to testify. She testified at length and freely. She rejected the court's offer of a lawyer to advise her.

The focus of the Court's concern in *Webb* was that "in light of the great disparity between the posture of the presiding judge and that of a witness in these circumstances, the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a voluntary choice whether or not to testify." *Id.* at 98. In the case sub judice, a judge did not exert pressure on the witness; on the contrary, he used his office to provide her every opportunity to testify freely. The witness was not driven from the stand; she took it willingly and gave testimony freely.

I do not discern any denial of a fair trial to the defendant. The evidence of his guilt is overwhelming. I would affirm the judgment of the district court.

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